a "sentencing factor" requiring only judicial determination and proof by a preponderance of the evidence.

In *McMillan v. Pennsylvania*, 477 U.S. 79, 88 (1986), Justice Rehnquist wrote for the majority and sustained the validity of a Pennsylvania statute that provided for a mandatory minimum 5 year sentence upon conviction of certain enumerated felonies after a finding by the sentencing judge by a preponderance of the evidence that the defendant possessed a firearm. Justice Rehnquist noted "[s]ection 9712 'ups the ante' for the defendant *only by raising to five years* the minimum sentence. . . . [] The statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88 (quotations in original) (emphasis added).

In *Jones v. United States*, 526 U.S. 227, 233 (1999), the Supreme Court found "serious bodily injury" to be an element of the offense of carjacking where the statute authorized "steeply higher penalties." Justice Souter writing for the majority stated, "[i]f a potential penalty might rise from 15 years to life on a nonjury determination, the jury's role would correspondingly shrink from the significance usually carried by determinations of guilt to the relative importance of low-level gatekeeping. . . ." *Id.* at 243-244.

In *Castillo v. United States*, 530 U.S. 120 (2000), the Supreme Court found that the fact of whether or not a firearm carried during a crime of violence was a "machinegun" was an element of the offense and not a sentencing factor. The judicial determination of the presence of a "machinegun" resulted in an increase of the minimum sentence from 5 years to 30 years. Justice Breyer stated

that "the length and severity of an added mandatory sentence [] weighs in favor of treating such offense-related words as referring to an element." *Id.* at 131.

In *Harris v. United States*, 536 U.S. 545 (2002) the Supreme Court held that the commission of a drug trafficking offense while using or carrying a firearm defined a single offense and whether the firearm was "brandished" or "discharged" was merely a sentencing factor. The Supreme Court distinguished *Jones* because the consequence of a judicial determination that a firearm had been brandished or discharged only resulted in "incremental changes" to the minimum penalty. *Id.* at 554.

The requirements of 21 U.S.C. § 851 lend support to the argument that congress intended the "prior convictions" addressed in § 841 *et seq.* to be elements of the substantive offense. Section 851 of Title 21 describes the proceedings by which the government may establish the fact of a defendant's prior convictions in order to increase a sentence after a conviction within § 841 *et seq.* In summary, subsection (a) mandates that the government file an information before trial which includes a written description of the prior convictions the government will rely upon to seek an increased sentence. 21 U.S.C. § 851(a). Subsection (b) mandates that the court "shall" inquire of the defendant whether or not he affirms or denies the alleged convictions. 21 U.S.C. § 851(b). Subsection (c) entitles the defendant to a hearing subsequent to his written challenge to the validity of the prior conviction. 21 U.S.C. § 851(c). At the hearing, held before a judge, the government has the burden of proof beyond a reasonable doubt on any issue of fact except as to constitutional challenges which require the defendant to prove any issue of fact by a preponderance of the evidence. 21 U.S.C. § 851(c)(1), 21 U.S.C.

§ 851(c)(2). If an alleged conviction occurred more than five years before the filing of the information the statute of limitations contained in § 851(e) prohibits a defendant from challenging its validity. 21 U.S.C. § 851(e).

Brown asserts that if he is successful in persuading this court that his prior convictions should have been submitted to the jury – either based on a Sixth Amendment challenge or based on this court finding that a statutory interpretation of § 841 requires the fact of prior convictions to be elements of the offense – then 851(e) barring him the right to challenge the priors because they were more than 5 years old must fall.

In *United States v. Henderson*, 320 F.3d 92, 104 (1st Cir. 2003), the First Circuit court found § 851(e) constitutional. However, that finding was based on the court's determination that "no fundamental right" was at issue.

Unlike the illegal reentry statute, 21 U.S.C. § 851 provides notice to the defendant by the requirement that the government file an information, entitles both the defendant and government to introduce evidence at a hearing and provides for proof beyond a reasonable doubt (except as to constitutional challenges which require the defendant to prove any issue of fact by a preponderance of the evidence). The protections included in § 851 make clear that Congress intended that prior convictions be more than mere sentencing enhancements.

In Brown's case, the increase of the minimum sentence from 10 years to life imprisonment was not "incremental." A statutory interpretation of 841(b), *et seq.* will support the proposition that factual findings of prior convictions must be elements of the substantive offense. By removing the fact of prior convictions from the jury's

determination, the jury's role is reduced to "low-level gatekeeping." This most certainly made the recidivism element of 21 U.S.C. § 841 *et seq.* the "tail which wags the dog of the substantive offense." Regardless of the label – either sentencing enhancement or element of the offense – the judicial determination that resulted in a life sentence violated the Fifth and Sixth Amendments.

2. The sentencing provisions of 21 U.S.C. § 841 are ambiguous.

Brown asserts that 21 U.S.C. § 841 contains an ambiguity that necessitates Supreme Court review. In summary, the word "cocaine" which precedes the words "its salts" in 841(b)(1)(A)(ii)(II) means pure cocaine. Its chemical formula is (C[17]H[21]NO[4]). The words "cocaine base" in 841(b)(1)(A)(iii) also means pure cocaine and also has an accepted chemical formula of (C[17]H[21]NO[4]). Therefore, a verdict of possession of "cocaine base" can result in two distinct sentences.

Upon conviction of 21 U.S.C. § 841(b)(1)(A)(iii) and 846, conspiracy and possession with the intent to distribute "cocaine base," the trial court imposed a sentence of life without parole. Brown did not object at the trial court to the ambiguity of 21 U.S.C. § 841(b)(1)(A)(iii) and the First Circuit found he failed to survive plain error review. Brown asserts that the First Circuit erred when it rejected his ambiguity argument.

The ambiguity of 21 U.S.C. § 841 lies in the fact that two separate penalty provisions attach to a conviction of possession of more than 50 grams of "cocaine base." The government conceded that the "broad definition" of cocaine in § 841(b)(1)(A)(ii) covers cocaine base. (Gov. Brief to the

First Circuit at p. 58). This confluence in the statute allows a sentencing judge to sentence a defendant convicted of possessing more than 50 grams of cocaine base pursuant to 841(b)(1)(C) which would result in a prison term of not more than 30 years – even if two prior drug convictions existed, or pursuant to the more onerous penalty in 841(b)(1)(A)(ii)(II) which mandates a life sentence when the defendant has two or more prior drug convictions.

Title 21 U.S.C. § 841(b) establishes penalties for possession with intent to distribute illegal drugs. Penalties increase depending on the weight and type of drugs involved. Possession of more than 50 grams of "cocaine base" will trigger a much greater sentence than possession of the same quantity of "cocaine." Compare 21 U.S.C. § 841(b)(1)(A), 21 U.S.C. § 841(b)(1)(B) and 21 U.S.C. § 841(b)(1)(C).

At trial the government's forensic chemist testified that cocaine and cocaine base have the same compound. The implication of the fact that the words "cocaine" and "cocaine base" carry the same chemical meaning" was addressed in *United States v. Brisbane*, 367 F.3d 910, 912 (D.C. Cir. 2004), *cert denied*, 160 L. Ed. 2d 245, 125 S. Ct. 342, 2004 U.S. LEXIS 6887, 73 U.S.L.W. 3236 (U.S. 2004). Because "cocaine" and "cocaine base" have the same chemical formula "the statute appears ambiguous, providing two different sets of penalties for the same offense." *Ibid.* at 912. Therefore, a jury finding of "cocaine base" can also authorize the same penalty as "cocaine" under 841(b)(1)(A)(ii)(II) because "cocaine" and "cocaine base" are chemically indistinct. It is well settled that "cocaine base" is a form of "pure cocaine" and each has the same chemical formula. *See, e.g., United States v. Barbosa*, 271 F.3d 438 (3rd Cir. 2001); *United States v. Fisher*, 58 F.3d 96 (4th Cir.

1995); *United States v. Robinson*, 144 F.3d 104 (1st Cir. 1998).

A number of circuits have resolved ambiguity issues in the statute by determining that "cocaine base" means "crack" for purposes of sentencing. Therefore even though cocaine base and pure cocaine have the same chemical formulas "crack" has an additional meaning and is subjected to increased penalties. In *United States v. Booker*, 70 F 3d 488, 494 (7th Cir. 1995), the Seventh Circuit held that cocaine base and cocaine have the same scientific meaning but concluded that Congress and the sentencing commission intended enhanced penalties to apply to "crack."

The Third Circuit made distinctions depending on the basis for the sentence. In *United States v. Barbosa*, 271 F.3d 438, 467 (3rd Cir. 2001), it held "while the term cocaine base means only "crack" when a sentence is imposed under the Sentencing Guidelines, "cocaine base" encompasses all forms of cocaine base with the same chemical formula when the mandatory minimum sentences under 21 U.S.C. § 841(b)(1) are implicated." *Ibid.*

In *United States v. Fisher*, 58 F.3d 96, 99 (4th Cir. 1995), the Fourth Circuit resolved the same ambiguity argument by interpreting clause (ii) to address cocaine powder and other forms except "crack" and clause (iii) to address "crack."

The Eleventh Circuit held that under the Guidelines, forms of cocaine base other than "crack" are treated as cocaine hydrochloride for sentencing purposes. *United States v. Munoz-Realpe*, 21 F.3d 375, 377 (11th Cir. 1994) (interpreting Guideline 2D1.1(c)).

The issues presented here are similar to those the Supreme Court confronted in *United States v. Neal*, 516 U.S. 284 (1996) where the Court found that § 841(b)(1) directed a sentencing court to take into account the actual weight of the blotter paper with LSD even though the Sentencing Guidelines required a different method of calculating the weight of LSD. The Supreme Court adhered to stare decisis in its interpretation of the statute and did *not* decide what deference the Sentencing Commission deserved in its separate interpretation of the statute. Until Congress acts to remove the ambiguity from the statute this Court should apply the rule of lenity and sentence Brown to the lowest sentence authorized by the jury's verdict.

The rule of lenity mandates that an ambiguous criminal statute should be construed in favor of the accused. *Staples v. United States*, 511 U.S. 600, 619, n. 17 (1994). The Supreme Court has held that "[i]t is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern." *Clark v. Martinez*, 2005 U.S. LEXIS 627, *citing e.g., Leocal v. Ashcroft*, 543 U.S. ___, ___, 160 L. Ed. 2d 271, 125 S. Ct. 377 (2004) (slip op. at 9-10, n. 8) (explaining that, if a statute has criminal applications, "the rule of lenity applies" to the Court's interpretation of the statute . . . "). Brown maintains that when such an ambiguity exists the rule of lenity entitles him to be sentenced under the less onerous penalty provision in order to avoid a *United States v. Colon-Ortiz*, 866 F.2d 6 (1989) constitutional problem.

The ambiguity in defendant's case should be resolved by application of the rule of lenity and imposition of the lower sentence applicable for possession of more than 50 grams of "cocaine." The court should remand for re-sentencing pursuant to 841(b)(1)(C).

CONCLUSION

For the above reasons, Charles Brown requests this Court grant his petition for certiorari.

Respectfully submitted,

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UNITED STATES OF AMERICA, Appellee, v. CHARLES H. ISLER, Defendant, Appellant. UNITED STATES OF AMERICA, Appellee, v. BILAL ABDUL RASHID, Defendant, Appellant. UNITED STATES OF AMERICA, Appellee, v. CHARLES C. BROWN, Defendant, Appellant.

No. 04-1565, No. 04-1566, No. 04-1673

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

429 F.3d 19; 2005 U.S. App. LEXIS 24600; 68 Fed. R. Evid. Serv. (Callaghan) 973

November 16, 2005, Decided: APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND. Hon. Mary M. Lisi, U.S. District Judge. **COUNSEL:** James E. Methe for appellant Charles H. Isler.

William J. Murphy, with whom Murphy & Fay, LLP was on brief, for appellant Bilal Abdul Rashid.

Tamara A. Barney, with whom MacFadyen Gescheidt & O'Brien was on brief, for appellant Charles C. Brown.

Donald C. Lockhart, Assistant United States Attorney, with whom Robert Clark Corrente, United States Attorney, and Adi Goldstein, Assistant United States Attorney, were on brief, for appellee.

JUDGES: Before Torruella, Circuit Judge, Hill, Senior Circuit Judge,* and Howard, Circuit Judge.

OPINION BY: HOWARD

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* Of the U.S. Court of Appeals for the Eleventh Circuit, sitting by designation.

OPINION:

HOWARD, Circuit Judge. In these consolidated criminal appeals, defendants Charles Brown, Charles Isler, and Bilal Abdul Rashid challenge their convictions and sentences for participating in a cocaine base distribution conspiracy. We affirm the convictions and Brown's sentence, but vacate Isler and Rashid's sentences.

I.

We present the facts in the light most favorable to the verdicts. *See United States v. Boulerice*, 325 F.3d 75, 79 (1st Cir. 2003).

On the afternoon of June 3, 2003, Detective Scott Partridge of the Providence Police Department was surveilling the rear of Brown's multi-family house from an adjacent yard. The house had previously been the subject of extensive surveillance, and the Providence police had executed a number of controlled buys of cocaine base from the first floor apartment. As Partridge watched, Brown pulled his car into his house's yard, which was empty except for an old junk car. Brown exited the car carrying a cheese puff container and a brown paper bag. Partridge saw Brown remove a plastic bag containing a white substance from the paper bag and place it in the false bottom of the container. Brown then returned the container to his car and entered the first floor apartment with the bag and its remaining contents. No one else entered or left the house.

Approximately half an hour later, Partridge and several other officers executed a search warrant for the apartment. Two of the officers covered the front door, and

the rest entered through the back. All were clad in black windbreakers bearing the legend "Providence Police" in large, yellow letters. Partridge's team proceeded to the rear door of the first floor apartment, announced its presence, received no response, and then forcibly entered. The entry took considerable effort: the rear door was heavily fortified with steel bars, had no handle, and could be opened (from either side) only with a key for the heavy deadbolt lock. Also, a second interior door was wedged in tightly inside the fortified exterior door. Notably, the exterior door contained a four by six inch "cut out" and a large kitchen knife was hidden in the door's interior panel.

Brown, Isler, and Rashid were standing near the kitchen table when the officers entered through the back entrance, and attempted to flee through the front door. But upon hearing the other officers outside, they reversed field and attempted to force their way past the original entry team. A violent struggle ensued, and the defendants were subdued. Brown had $65 upon his person, Rashid had $1078, and Isler had $515.

The apartment was small and sparsely furnished, except for the kitchen. On the kitchen table, surrounded by three chairs, the officers found monitors for a sophisticated surveillance system comprised of several cameras, a motion sensor, an intercom, and a pair of exterior lights – one red and the other green. On the same table was the paper bag that Brown had carried into the apartment. Inside the paper bag were two plastic bags containing 142.45 grams of cocaine base. Also on the table were a digital scale, plastic bags, plastic bags with their corners snipped off, scissors, baking soda, a razor, a cooking plate with cocaine base residue, $250 in cash, two cell phones, a pager, and Isler's wallet and keys. The only key for the

deadbolt lock on the fortified rear door hung on a hook near the table.

The officers also collected 26 small packages containing 6.328 grams of cocaine base from an overflowing toilet in a nearby bathroom. A search of Brown's car yielded the cheese puff container, which contained an additional 16.73 grams of cocaine base.

All three defendants were charged with conspiracy to possess with intent to distribute 50 or more grams of cocaine base (Count I), *see* 21 U.S.C. § 846, and possession with intent to distribute 50 or more grams of cocaine base (Count II), *see* 21 U.S.C. §§ 841(a)(1) & (b)(1)(A). In addition, based on the narcotics found in his car, Brown was charged with possession with intent to distribute 5 or more grams of cocaine base (Count III), *see* 21 U.S.C. §§ 841(a)(1) & (b)(1)(B).

At trial, the government called several officers and forensic specialists, and the government's case included expert testimony that the surveillance equipment, barricaded doors, and cut out[1] on the exterior door were indicative of a drug house. Only Brown testified for the defense. He testified that he had been let in by three unidentified men who left moments before the raid; that he was present only to collect rent from his tenant; that there were no drugs in the house or his car; that he had never seen Rashid or Isler before the raid; that Rashid was there to purchase his tenant's minivan; that Isler was sitting in a bedroom (possibly listening to music); that there were at

[1] The cut out was large enough to pass drugs and money through, but small enough that a drug purchaser could not get a clear look at the seller on the other side of the door.

least four cars in the yard at the time of the raid; that he tried to let the police in when they knocked but they ordered him away from the door; that the defendants did not try to flee or resist; and that the security and surveillance equipment had been installed by the previous owner and/or was typical for homes in the area.

The jury convicted Brown on all counts. The jury also convicted both Isler and Rashid, but held them responsible for less than 5 grams of cocaine base on both counts (and not for the 50 or more grams originally charged in the indictment). Isler and Rashid were sentenced to 262 and 210 months' imprisonment, respectively. Brown received a mandatory life sentence because he had two prior felony narcotics convictions. *See* 21 U.S.C. § 841(b)(1)(A).

II.

The defendants challenge their convictions and sentences on several grounds. The primary appellate issues are (1) whether there was sufficient evidence to sustain Isler and Rashid's convictions; (2) whether the district court erroneously permitted detailed cross-examination concerning Brown's prior convictions; (3) whether the court abused its discretion when it admitted testimony from one of the government's experts; (4) whether the government's closing argument was inappropriate and prejudicial; (5) whether the court should have applied the rule of lenity to sentence Brown to a shorter prison term because the relevant provisions of 21 U.S.C. § 841 are ambiguous; and (6) whether the defendants are

entitled to resentencing under *United States v. Booker*, 543 U.S. 220, 125 S.Ct. 738, 160 L.Ed.2d 621 (2005).[2]

A. Sufficiency of the Evidence

Rashid and Isler claim that the district court erroneously denied their motions for acquittal because the government demonstrated only that they were "merely present" at the drug raid.[3] *See United States v. Llinas*, 373 F.3d 26, 32 (1st Cir. 2004) (government must prove more than mere presence to obtain drug conspiracy conviction). Isler and Rashid maintain that they did not own the house, that the three defendants had never met before the raid, that neither Rashid nor Isler was ever in the house before the raid, and that there was no evidence that they possessed or agreed to possess the narcotics.

We review the denial of a motion for acquittal de novo. *See Boulerice*, 325 F.3d at 79. We will affirm if, after reviewing all the evidence in the light most favorable to the government and drawing all reasonable inferences in its favor, we conclude that a rational jury could find the essential elements of the crime proved beyond a reasonable doubt. *Id.*

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[2] The government maintains that certain of the defendants' arguments were not preserved for plenary appellate consideration. We shall assume, without deciding, that the issues were properly preserved unless we state otherwise.

[3] Rashid also makes a passing attempt to assign error to the district court's failure to provide a limiting instruction that he had requested. But Rashid's argument is undeveloped and therefore forfeited. *See United States v. Vasquez-Guadalupe*, 407 F.3d 492, 499-500 (1st Cir. 2005). In any event, there was no abuse of discretion, as the district court ultimately instructed the jury that Brown's prior convictions could only be considered in evaluating Brown's credibility.

Isler and Rashid argue as though only direct evidence can support their convictions. But of course, this is not so; indeed the government may rely entirely on circumstantial evidence to prove the charged offense. *See United States v. Soler,* 275 F.3d 146, 150 (1st Cir. 2002); *see also United States v. Batista-Polanco,* 927 F.2d 14, 19 (1st Cir. 1991) (a conspiracy can be demonstrated by "a development and a collocation of circumstances") (internal citation and quotation omitted). As we have explained:

> defendant's presence at a place where contraband is found may or may not be purely coincidental. The attendant circumstances tell the tale – and the culpability of a defendant's presence hinges upon whether the circumstances fairly imply participatory involvement. In other words, a defendant's "mere presence" argument will fail in situations where the "mere" is lacking.

United States v. Echeverri, 982 F.2d 675, 678 (1st Cir. 1993).

The facts surrounding Isler and Rashid's arrest permitted the jury to find that they were more than merely present. Detective Partridge saw Brown bring a substance that proved to be cocaine base into the house. When the officers burst through the heavily fortified back door, Isler, Rashid, and Brown were the only persons in the apartment and were standing near the kitchen table with three chairs. On the kitchen table were the monitors for an elaborate surveillance system, a quantity of cocaine base suggestive of narcotics distribution (and not personal use), cash, Isler's wallet and keys, and various drug packaging paraphernalia. In the bathroom, a few feet away, was evidence of a hasty and unsuccessful attempt to flush more cocaine base down the toilet. *Compare Soler,*

275 F.3d at 151; *Echeverri,* 982 F.2d at 678-79; *Batista-Polanco,* 927 F.2d at 17-19.

Further, the house was a fortress, with heavily reinforced doors and an extensive surveillance system. From this evidence, the jury could have inferred that the dealers wished to conduct their business in absolute secrecy and security, and that only the conspiracy's participants would be permitted into the apartment. *See generally Llinas,* 373 F.3d at 32 ("criminal conspirators do not involve innocent persons at critical stages of a drug deal"); *United States v. Montilla-Rivera,* 115 F.3d 1060, 1064 (1st Cir. 1997) (criminals do not welcome innocent bystanders as witnesses to their crimes); *United States v. Ortiz,* 966 F.2d 707, 712 (1st Cir. 1992) (criminals "rarely seek to perpetrate felonies before larger-than-necessary audiences").

Finally, the defendants fled from the police, and, when cornered, engaged a violent struggle with the officers. In appropriate circumstances, flight can be probative of guilt. *See United States v. Carpenter,* 403 F.3d 9, 12 (1st Cir. 2005); *United States v. Otero-Mendez,* 273 F.3d 46, 53 (1st Cir. 2001).

In sum, the district court properly concluded that there was sufficient evidence to support the convictions.[4]

B. Prior Convictions

Brown contends that the district court abused its discretion and prejudiced his defense by permitting the

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[4] For these same reasons, it was not an abuse of discretion for the district court to deny Isler and Rashid's motions for a new trial. *See Montilla-Rivera,* 115 F.3d at 1064.

government to cross-examine him in detail about his prior convictions before later ruling that the evidence was inadmissible.

Brown had three prior felony narcotics convictions, all involving marijuana. Before trial, the government filed a notice of intent to introduce the prior convictions for impeachment, *see* Fed.R.Evid. 609, and as admissible other bad act evidence, *see* Fed.R.Evid. 404(b), in anticipation of a mere presence defense. Brown never objected to the notice or filed a motion in limine to exclude the evidence. On direct examination, Brown testified about the basic facts of his prior convictions.[5] On cross-examination, the government re-elicited these basic facts and then inquired, under Rule 404(b), about the historical facts underlying his record. During the government's rebuttal argument, the prosecutor made reference to Brown's testimony about his prior convictions and Brown objected. After a bench conference, the court ruled that the 404(b) evidence of prior convictions was not allowed and instructed the prosecutor to refrain from making additional reference to it. The court did not, however, strike the prior testimony concerning the details of the prior convictions. Brown argues that he was prejudiced by the court's failure to exclude the 404(b) evidence. The government contends that there was no abuse of discretion and, in any event, the challenged testimony was harmless.

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[5] Brown admitted the following convictions and sentences: (1) a 1992 conviction for possession of marijuana for which he served six months of a four-year sentence; (2) a 1995 conviction for possession of 1-5 kilos of marijuana for which he served three years of a fifteen-year sentence; and (3) a 1995 conviction for possession of marijuana with intent to deliver and conspiracy to traffic in marijuana for which he served three years of a ten-year sentence.

We choose to proceed directly to the harmless error inquiry. "The admission of improper testimony is harmless if it is highly probable that the error did not influence the verdict." *United States v. Garcia-Morales,* 382 F.3d 12, 17 (1st Cir. 2004). A harmless error analysis is case specific, and requires consideration of such factors as the "centrality of the tainted evidence, its uniqueness, its prejudicial impact, the use to which the evidence was put, and the relative strengths of the parties' cases." *Id.*

Brown focuses on the admission of three facts: (1) that he did not remember the weight of the marijuana involved in one offense (but the prosecutor suggested ten pounds); (2) his exculpatory account of his involvement in one offense (essentially that Brown threw the marijuana in the trash at someone's behest); and (3) that he was arrested for one offense with $16,000 on his person. In the circumstances of this case, we conclude that these facts did not sway the jury.

The challenged facts added little to the basic facts of convictions, which had been recounted twice on direct and cross-examination. Moreover, they were not highlighted in the prosecution's argument, and were inconsequential when evaluated against the balance of the prosecution's considerable evidence.[6] Any error in the admission of this evidence was harmless.

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[6] Brown also argues that the prosecutor committed misconduct by referring to Brown's prior convictions during cross-examination and closing argument. But as we have explained, it was not apparent until the government's rebuttal argument that the prior conviction evidence was off-limits. After the district court's ruling, the prosecutor made no further mention of the convictions. There was no misconduct.

C. A'Vant's Testimony

Brown argues that the district court abused its discretion by admitting certain testimony from Officer Angelo A'Vant, one of the government's expert witnesses, concerning the features of a drug house. Brown does not challenge A'Vant's qualifications as an expert. Rather, he challenges the relevance of his testimony to Brown's house. Specifically, Brown complains that A'Vant was permitted to testify that the security and surveillance set-up at Brown's house was something that he had never previcusly seen.[7] According to Brown, this testimony was irrelevant and highly prejudicial because it permitted the prosecutor to argue that the defendants were unusually "sophisticated" criminals. Brown concedes that our review is for plain error only. A plain error must be "clear or obvious, affect substantial rights, and seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Garcia-Morales*, 382 F.3d at 18.

Brown's argument fails for many reasons, the most basic of which is that he misstates the essence of A'Vant's testimony. Prior to the challenged testimony, A'Vant had testified at length that the barricades and surveillance features on Brown's house were consistent with those at other drug houses that he had raided. The routine patrol questions were intended to show that "normal" houses in

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[7] Brown complains only about two snippets in A'Vant's direct testimony. In the first, A'Vant responded to the question whether he had ever encountered barricaded doors on "routine" police calls (as distinguished from drug raids) as follows: "On routine calls, I have never seen a similar set-up like this is my career." In the second, in response to the question how many times he had seen a green light bulb in the hallway of a residence during his years as a patrol officer, A'Vant stated: "I don't ever recall seeing a green light bulb."

the area did not have such features. This testimony was responsive to Brown's defense that he was merely present at the crime scene, which Brown supported with his testimony that his house was just like any other house in that part of Providence. In short, A'Vant simply did not testify that he was unfamiliar with the equipment at Brown's house. There was no error in the admission of A'Vant's testimony, plain or otherwise.[8]

D. Prosecutorial Misconduct

Isler claims that the prosecutor, during her closing argument, twice improperly shifted the burden of proof to the defendants and improperly vouched for the government witnesses.

In the first challenged remark, the prosecutor was discussing Brown's testimony regarding the house's security features:

> Charles Brown would have you believe that this is to protect people from burglary, that this set-up is all over the place. In fact, it's in the other apartment that he owns. Well, where is the documentary proof of that, ladies and gentlemen? None. You just have Charles Brown's word.

Brown's counsel objected, and the district judge sustained the objection and instructed the jury to disregard the remark.

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[8] Having dispatched each of Brown's individual assignments of prejudicial error, we summarily reject his claim that the alleged errors combined to deprive him of a fair trial.

The second challenged remark concerned Brown's claim that he was merely present at the crime scene to collect rent from his tenant:

> And he tells you that he went in to collect the rent. Well, if he went to collect the rent, why didn't he take his rent receipt book with him? You know why, ladies and gentlemen. Because there is no rent receipt book, because he wasn't there to collect the rent, because there was no tenant, because again, ladies and gentlemen, other than Charles Brown's word, there is no proof of Anthony Wilson as a tenant. His name is not on the utility bills.

The district court again sustained defense counsel's objection and instructed the jury to disregard the statement. The prosecutor then stated:

> So you have to choose in whom you're going to place your trust, ladies and gentlemen, and you know in whom the defense placed their trust. They embraced the testimony. . . .

Defense counsel interrupted the prosecutor with an objection, which the court sustained.

None of these lines of argument was improper. Isler's "burden shifting" claim disregards the fact that Brown testified at length and that all the defendants endorsed Brown's testimony in their closings. "[W]hen a defendant puts [his] credibility at issue by testifying, the prosecution can comment on the implausibility of [his] testimony or its lack of evidentiary foundation." *Boulerice,* 325 F.3d at 86. Here, the prosecutor merely called attention to the lack of supporting evidence for Brown's implausible assertions and attempted to highlight the fact that rival accounts had been presented to the jury.

In addition to burden shifting claims, Isler also argues that the prosecutor improperly placed her prestige as a government officer behind the testimony of the police officers. The challenged comment came on the heels of suggestions by defense counsel that the officers' testimony (in particular Partridge's) contained gaping inconsistencies which were indicative of fabrication.

The prosecutor began by recounting that the officers all remembered the significant matters the same way, that the differences in recollection were trivial, and that the jury should be more concerned if there were not small variations in their testimony. She continued:

> If Detective Partridge was so frustrated, if they were all so intent on securing a conviction against these Defendants, wouldn't they have come up with a better story, ladies and gentlemen? Why not put the keys to the doors of the apartment on the key chain of one of the Defendants? Why not put the drugs in the Defendants' pockets? Why not tell you that they observed one of the Defendants run out of the bathroom? Why not tell you that they saw the three Defendants together numerous times prior to June 3rd?
>
> Ladies and gentlemen, that is how you evaluate the credibility of that testimony. It has the ring of truth. Conspiracies are secret. They happen behind locked doors.

Defense counsel objected and moved for a mistrial. The district court sustained the objections, instructed the jury

to disregard the "ring of truth" comment, and took the motions for mistrial under advisement.[9]

"A prosecutor improperly vouches for a witness when she places the prestige of her office behind the government's case by . . . imparting her personal belief in a witness's veracity or implying that the jury should credit the prosecution's evidence simply because the government can be trusted." *United States v. Perez-Ruiz,* 353 F.3d 1, 9 (1st Cir. 2003).

The challenged remarks do not constitute improper vouching. First, arguing why a witness should be believed or asking jurors to use their common sense in assessing witness testimony is not vouching. *See Id.* at 10; *Rodriguez,* 215 F.3d at 123. Second, the prosecutor did not express her personal views regarding the officers' accounts or imply that they should be believed because they were government officials. *See Perez-Ruiz,* 353 F.3d at 10. Third, the comments were a logical counter to the defense claim of witness fabrication, and we have upheld such rejoinders. *See United States v. Wilkerson,* 411 F.3d 1, 8 (1st Cir. 2005); *United States v. Vazquez-Rivera,* 407 F.3d 476, 483-84 (1st. Cir. 2005); *Perez-Ruiz,* 353 F.3d at 10.

E. Ambiguity in Cocaine/Cocaine Base Provisions

Brown argues that he should have received a lower sentence under 21 U.S.C. § 841 under the rule of lenity. Brown begins with the fact that a certain quantity of "cocaine base" will trigger a far harsher sentence than the same quantity of "cocaine, its salts, optical and geometric

[9] These motions were later denied.

isomers, and salts of isomers." *Compare* 21 U.S.C. § 841(b)(1)(A)(ii)(II) & (B)(ii)(II) *with* 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii). From there he reasons that because "cocaine base" and "cocaine" are chemically identical and the substance "cocaine base" falls within the extended definition of "cocaine" ("cocaine, its salts, optical and geometric isomers, and salts of isomers"), the penalty provision in 21 U.S.C. § 841 is fatally ambiguous because a conviction for possessing "cocaine base" would appear to be eligible for punishment under both the "cocaine" and "cocaine base" penalty provisions. Therefore, Brown posits, because the jury found only that he possessed "cocaine base," he is entitled to receive the statutory sentence provided for distributing more than 50 grams of "cocaine," relying upon *United States v. Brisbane,* 367 F.3d 910 (D.C. Cir. 2004).[10] Brown again concedes that our review is for plain error only.

We readily conclude that there was no plain error. First, Brown's claim that "cocaine" and "cocaine base" are chemically identical is inaccurate. *See United States v. Robinson,* 144 F.3d 104, 108-9 (1st Cir. 1998) (noting differing chemical formulas); *United States v. Barnes,* 890 F.2d 545, 552 (1st Cir. 1989) ("the term 'cocaine base' clearly defines a substance differing from other forms of cocaine"). Second, this court has concluded that the term "cocaine base" in Section 841(b) includes all forms of cocaine base (not simply crack). *See United States v.*

[10] Holding that, in the absence of proof the "cocaine base" that defendant possessed was crack or another smokable form of cocaine base (which Congress intended to punish more severely than "cocaine"), defendant was entitled to be sentenced under "cocaine" penalty provision. *See Brisbane,* 367 F.3d at 913-15.

Medina, 427 F.3d 88, 92 (1st Cir. 2005); *United States v. Richardson,* 225 F.3d 46, 49 (1st Cir. 2000); *United States v. Lopez-Gil,* 965 F.2d 1124, 1134 (1st Cir. 1992) (opinion on rehearing). *See also Barnes,* 890 F.2d at 553 (cocaine base provision not unconstitutionally vague). In this case, the government presented undisputed evidence that the substance seized was cocaine base, and the jury so found. There was no error in Brown's sentence.[11]

F. Booker

All three defendants argue that they are entitled to a remand for resentencing under *Booker.* They all maintain that the district judge's comments at sentencing clearly indicate that she would have imposed a lower sentence if the guidelines were not mandatory. In addition, they contend that drug quantity and the existence of their prior convictions are facts that must be found by a jury. All three concede that our review is for plain error only.

To establish a plain error under *Booker,* a defendant must demonstrate (1) an error, (2) that is plain, (3) that affects substantial rights, and (4) that seriously impairs the fairness, integrity, or public reputation of judicial proceedings. *See United States v. Antonakopoulos,* 399 F.3d 68, 77 (1st Cir. 2005). The first two prongs are met if the district court treated the Sentencing Guidelines as

[11] As to Brown's reliance on *Brisbane,* the clear or obvious error prong is not satisfied where the district court declined to follow a case from another circuit that concedes it is expressing a minority view and is explicitly at odds with this circuit's precedent. *Cf. United States v. D'Amario,* 412 F.3d 253, 256-57 (1st Cir. 2005) (no plain error if circuit courts are split on issue).

mandatory. *Id.* Thus, we must determine if the defendants satisfy the third and fourth prongs of the test.

In the *sui generis* circumstances of assessing the appropriateness of a *Booker* remand under the plain error standard, our cases have consistently held that a remand is appropriate if the district judge has made comments in the sentencing record indicating a reasonable probability that she would have imposed a lower sentence if unshackled by the mandatory guidelines. *See Antonakopoulos,* 399 F.3d at 81; *United States v. Heldeman,* 402 F.3d 220, 224 (1st Cir. 2005); *Wilkerson,* 411 F.3d at 10. As to prongs three and four, "our principal concern in these *Booker* 'pipeline' cases is with the likelihood that the defendant would have received a lesser sentence in a post-*Booker* regime of advisory guidelines." *Heldeman,* 402 F.3d at 224; *see also Wilkerson,* 411 F.3d at 10.

We begin with Isler and Rashid, both of whom were sentenced at the bottom of their respective guideline ranges. In both their sentencing proceedings, the district judge made a host of comments about her lack of discretion under the guidelines and the "waste" brought about by the length and extreme harshness of the sentences. Moreover, the district judge stated that the sentence was "tragic" because she was "not sure that a sentence of this length is absolutely necessary" and that she was not sure that, in the absence of the guidelines, she "would have imposed that harsh a penalty." In light of these remarks, which indicate a reasonable probability of lower sentences under advisory guidelines, Isler and Rashid are entitled to resentencing.

Brown is less fortunate for two reasons. First, Brown received a mandatory statutory (rather than guidelines)

life sentence based upon the instant convictions and his two prior narcotics convictions (the existence of which he admitted). *Booker* does not apply in such circumstances. *See Antonakopoulos,* 399 F.3d at 75 ("A mandatory minimum sentence imposed as required by statute based on facts found by a jury or admitted by a defendant is not a candidate for *Booker* error"); *United States v. Bermudez,* 407 F.3d 536, 545 (1st Cir. 2005) (same). Second, Brown's contention that his criminal history must be proved to a jury beyond a reasonable doubt is foreclosed by our recent precedent. *See United States v. Work,* 409 F.3d 484, 491 n. 1 (1st Cir. 2005) ("In the roiled wake of *Booker,* it remains the law that previous criminal convictions are not 'facts' that must be found by a jury and proved beyond a reasonable doubt."); *United States v. Lewis,* 406 F.3d 11, 21 n. 11 (1st Cir. 2005) (same).[12]

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[12] Brown also argued in his initial brief that the district court erred in determining that his prior convictions were unrelated under the guidelines. However, Brown later conceded that this is a statutory rather than a guidelines determination. *See United States v. De Jesus Mateo,* 373 F.3d 70, 74 (1st Cir. 2004). In his reply brief and at oral argument, Brown made a related argument that the district court erroneously applied the guidelines standard rather than the statutory standard in determining whether his prior convictions involved distinct criminal episodes for purposes of 21 U.S.C. § 841(b)(1)(A). This claim is forfeited. *See United States v. Evans-Garcia,* 322 F.3d 110, 114 (1st Cir. 2003) (arguments not raised until reply brief are waived); *Gosselin v. Commonwealth of Massachusetts,* 276 F.3d 70, 72 (1st Cir. 2002) (arguments not raised until oral argument are waived). Moreover, the facts regarding the circumstances of the two prior offenses, notably the significant gap between the offenses and the intervening arrest (which Brown conceded below and on appeal), make it clear that the offenses were distinct criminal episodes. *See generally De Jesus Mateo,* 373 F.3d at 74; *Martinez-Medina,* 279 F.3d at 123.

Brown also argues that *Almendarez-Torres v. United States,* 523 U.S. 224, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998) should be overruled.

(Continued on following page)

III.

For the reasons stated above, Isler and Rashid's convictions are **affirmed,** their sentences are **vacated,** and their cases are **remanded** for resentencing in accordance with this opinion. Brown's conviction and sentence are **affirmed.**

So ordered.

However, he concedes that this is beyond this court's power, and states that he merely intends to preserve the issue for possible review before the U.S. Supreme Court.

TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
CONTROL AND ENFORCEMENT
OFFENSES AND PENALTIES
21 USCS § 841 (2005)

§ 841. Prohibited acts A

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this

subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 4,000,000 if the defendant is an individual or $ 10,000,000 if the

defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812 note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced

to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III (other than gamma hydroxybutyric acid), or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of

imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised

release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 100,000 if the defendant is an individual or $ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this title or title III or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 200,000 if the defendant is an individual or $ 500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [21 USCS § 844] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal

property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;

(C) $ 500,000 if the defendant is an individual; or

(D) $ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled

substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [21 USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of

this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "booby-trap" defined.

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, United States Code, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, United States Code, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [21 USCS § 830]) shall be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [21 USCS § 830] have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

TITLE 21. FOOD AND DRUGS
CHAPTER 13. DRUG ABUSE PREVENTION AND CONTROL
CONTROL AND ENFORCEMENT
OFFENSES AND PENALTIES
21 USCS § 851 (2005)

§ 851. Proceedings to establish previous convictions

(a) Information filed by United States Attorney.

(1) No person who stands convicted of an offense under this part [21 USCS §§ 841 et seq.] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon. Upon a showing

by the United States attorney that facts regarding prior convictions could not with due diligence be obtained prior to trial or before entry of a plea of guilty, the court may postpone the trial or the taking of the plea of guilty for a reasonable period for the purpose of obtaining such facts. Clerical mistakes in the information may be amended at any time prior to the pronouncement of sentence.

(2) An information may not be filed under this section if the increased punishment which may be imposed is imprisonment for a term in excess of three years unless the person either waived or was afforded prosecution by indictment for the offense for which such increased punishment may be imposed.

(b) Affirmation or denial of previous conviction. If the United States attorney files an information under this section, the court shall after conviction but before pronouncement of sentence inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

(c) Denial; written response; hearing.

(1) If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information. A copy of the response shall be served upon the United States attorney. The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment. The failure of the United States attorney to include in the

information the complete criminal record of the person or any facts in addition to the convictions to be relied upon shall not constitute grounds for invalidating the notice given in the information required by subsection (a)(1). The hearing shall be before the court without a jury and either party may introduce evidence. Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law.

(2) A person claiming that a conviction alleged in the information was obtained in violation of the Constitution of the United States shall set forth his claim, and the factual basis therefor, with particularity in his response to the information. The person shall have the burden of proof by a preponderance of the evidence on any issue of fact raised by the response. Any challenge to a prior conviction, not raised by response to the information before an increased sentence is imposed in reliance thereon, shall be waived unless good cause be shown for failure to make a timely challenge.

(d) Imposition of sentence.

(1) If the person files no response to the information, or if the court determines, after hearing, that the person is subject to increased punishment by reason of prior convictions, the court shall proceed to impose sentence upon him as provided by this part [21 USCS §§ 841 et seq.].

(2) If the court determines that the person has not been convicted as alleged in the information, that a conviction alleged in the information is invalid, or that the person is otherwise not subject to an increased sentence as

a matter of law, the court shall, at the request of the United States attorney, postpone sentence to allow an appeal from that determination. If no such request is made, the court shall impose sentence as provided by this part [21 USCS §§ 841 et seq.]. The person may appeal from an order postponing sentence as if sentence had been pronounced and a final judgment of conviction entered.

(e) Statute of limitations. No person who stands convicted of an offense under this part [21 USCS §§ 841 et seq.] may challenge the validity of any prior conviction alleged under this section which occurred more than five years before the date of the information alleging such prior conviction.